88-394 (1)

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

GEORGE S. ANSELL AND JOHN O. GOLDEN,

Petitioners,

v.

JOHN M. SHANNON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

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August 29, 1988

QUESTIONS PRESENTED

1. WHETHER A STATE APPELLATE COURT CAN DECLINE TO HEAR AN IMMEDIATE APPEAL FROM AN ORDER DENYING SUMMARY JUDGMENT TO STATE OFFICIAL DEFENDANTS ON THEIR CLAIM OF QUALIFIED IMMUNITY IN A SUIT BROUGHT UNDER 42 U.S.C. § 1983 ON THE GROUND THAT THE LEGAL STANDARDS ALLEGEDLY VIOLATED WERE NOT CLEARLY ESTABLISHED AT THE TIME IN QUESTION.

2. WHETHER PETITIONERS WERE ENTITLED TO QUALIFIED IMMUNITY IN THIS CASE.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners George S. Ansell and John O. Golden, and the Respondent was John M. Shannon. In addition, the Colorado School of Mines was a named defendant.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

The Petitioners, George S. Ansell and John O. Golden respectfully pray that a writ of certiorari issue to review the decision of the Colorado Court of Appeals of the State of Colorado entered in this proceeding on June 17, 1988.

OPINIONS BELOW

The opinion of the District Court for the County of Jefferson, State of Colorado denying Defendants' Motion for Summary Judgment was announced on November 16, 1987. That opinion was not reported. A verbatim copy is appended hereto as Appendix A.

On June 17, 1988, the Colorado Court of Appeals entered an Order of Dismissal on Petitioner's appeal. That Order was not reported. A verbatim copy is appended hereto as Appendix B.

On June 30, 1988, the Supreme Court of the State of Colorado denied Petitioners' Petition for Writ of Mandamus, or in the Alternative Petition for Relief in the Nature of Prohibition. That opinion was not reported. A verbatim copy is appended hereto as Appendix C.

JURISDICTION

The District Court for the County of Jefferson, State of Colorado, entered an order on November 16, 1987 denying in its entirety Petitioners' Motion for Summary Judgment based upon a state official's qualified immunity. Petitioners' timely appeal was dismissed by the Colorado Court of Appeals on June 17, 1988. Petitioners' Petition for Writ of Mandamus or in the Alternative Petition for Relief in the Nature of Prohibition was denied by the Supreme Court of the State of Colorado on June 30, 1988. This Petition for Certiorari was filed within 90 days of that date.

The jurisdiction of this Court to review the decision and judgment of the Colorado Court of Appeals is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257 provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is

drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988 provides in pertinent part:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and

> punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

Plaintiff John M. Shannon filed the instant action in the District Court for the County of Jefferson, State of Colorado on June 12, 1986 against the Colorado School of Mines ("CSM"), George S. Ansell, President of CSM, and John O. Golden, Vice-President for Academic Affairs of CSM. Shannon's complaint arises from his termination of employment as Director of Band, Director of the Geology Museum and Assistant Professor of Geology with CSM.

On October 7, 1987, Ansell and Golden moved for summary judgment on all of Shannon's remaining claims

for relief. At the time that motion was filed, the only remaining substantive claim against Ansell and Golden was a constitutional claim brought under 42 U.S.C. § 1983 for deprivation of a liberty or property interest without due process of law. Summary judgment was requested on behalf of Ansell and Golden on the grounds that they were entitled to the protection of qualified immunity.

By order dated November 16, 1987, the District Judge, Gaspar F. Perricone, denied Ansell and Golden's Motion for Summary Judgment on all claims. The Court found that "there are numerous material issues of fact presented in this case, and thus, summary judgment on any of the claims for relief would be inappropriate." *See*, Appendix A.

Ansell and Golden appealed the trial court's denial of summary judgment to the Colorado Court of Appeals on two grounds. First, they contend that the District Court's denial of Ansell and Golden's Motion for Summary Judgment based upon qualified immunity constitutes an appealable final decision notwithstanding the absence of a final judgment under Colorado law under this Court's decision in *Mitchell* v. *Forsythe*, 472 U.S. 511 (1985). Second, Ansell and Golden contend that the District Court erred in denying Ansell and Golden's Motion for Summary Judgment based upon qualified immunity.

The appeal was initially docketed in the Colorado Court of Appeals where Ansell and Golden were allowed to file an opening brief. Before Shannon's answer brief was due to be filed, the Court of Appeals issued an order to the Petitioners' to show cause why the appeal should not be dismissed for absence of a final judgment. The Court subsequently dismissed Petitioners' appeal without prejudice on June 17, 1988 on the grounds that the appeal was not of a final judgment. *See*, Appendix B.

On June 29, 1988, Ansell and Golden initiated an original proceeding in the Supreme Court in the State of Colorado on a petition for writ of mandamus or in the alternative petition for relief in the nature of prohibition. That petition was denied by the Colorado Supreme Court on June 30, 1988. *See*, Appendix C.

STATEMENT OF THE FACTS

John M. Shannon was employed at CSM as Director of the Geology Museum, Assistant Professor of Geology and Director of the CSM Band. Shannon alleges that his employment was terminated in violation of his contractual and constitutional rights.

Defendant Ansell is President of CSM and Defendant Golden is Vice President for Academic Affairs at CSM. Ansell and Golden contend that Shannon was afforded all of the contractual and constitutional rights due him prior to his termination. An independent investigation, they argue, which revealed that Shannon had traded state property out of museum collections without proper approval provided ample cause for his termination.

Based upon independent investigation, Ansell determined that Shannon's employment should be terminated both as faculty member and in his administrative capacity. Although Shannon was not employed under a teaching faculty contract, which incorporated the extensive termination review procedure in the CSM Faculty Handbook, he was offered the entire review procedure provided to faculty members in the handbook.

Ansell and Golden, in their Motion for Summary Judgment at the District Court level, requested that summary judgment be entered in their favor on the grounds that there was absolutely no evidence that either Ansell or Golden

knew or should have known that they were depriving Shannon of a clearly established constitutional right by terminating Shannon. In fact, Shannon himself argued in his Brief in Response to Defendants' Motion for Summary Judgment that "the provisions of the faculty handbook of CSM are unconstitutionally vague to the extent that Plaintiff and Defendants could not determine what his rights were." Furthermore, Shannon failed to articulate to the Court which rights of his were allegedly violated. For these reasons Ansell and Golden contend that it was error for the District Court not to enter summary judgment in their favor.

REASON FOR GRANTING THE WRIT

This case presents important and unsettled questions of first impression about the scope of protection afforded a government official asserting the defense of qualified immunity to a claim brought under 42 U.S.C. § 1983 when a plaintiff has initiated an action in state court. Earlier this term, this Court held that state notice of claim statutes which infringe on the remedial scheme of § 1983 are preempted pursuant to the Supremacy Clause. *Felder* v. *Casey*, ____ U.S. ____, 108 S.Ct. 2302 (1988). Now this Court is called upon to determine whether a state court's denial of a government official's right to immediately appeal denial of summary judgment on qualified immunity impermissibly burdens that congressionally created remedial scheme.

In *Mitchell* v. *Forsythe*, 472 U.S. 511 (1985), this Court refashioned qualified immunity to avoid "subjecting government officials either to the costs of trial or to the burdens of broad-reaching discovery in cases where the legal norms the officials are alleged to have violated were not clearly established at the time." 472 U.S. at 526. Recognizing that qualified immunity is an immunity from suit rather than a mere defense to liability, and is effectively lost if a

case is erroneously permitted to go to trial, this Court held in *Mitchell* that an order denying qualified immunity must be immediately appealable. Contrary to that policy, the Colorado Court of Appeals and Colorado Supreme Court refused to recognize Petitioners' rights to such immediate review. Thus, the issue before this Court is whether a state court can frustrate one of the chief purposes of qualified immunity and deny a government official to the entitlement of immunity from suit because that particular state court refuses to recognize the immediate appealability of denial of such a claim.

The need for immediate appealability in qualified immunity cases is strikingly exemplified in this case. As discussed *infra*, Petitioners properly raised qualified immunity in their Motion for Summary Judgment. Contrary to established case law, the state District Court failed to determine whether the legal norms allegedly violated were clearly established at the time. By holding that questions of material fact precluded summary judgment on qualified immunity, the District Court committed clear error. At a minimum, Judge Perricone was obligated to address the question of whether the legal norms were clearly established: this is a question of law and not a question of fact. An equally egregious error was subsequently committed by the Colorado appellate courts, which refused to recognize that denial of summary judgment on a claim of qualified immunity constitutes an appealable collateral order. This unfortunate decision leaves Colorado government officials without an avenue for redress of an erroneous trial court decision and effectively eviscerates the Petitioners' defense of qualified immunity by denying that immunity when it is properly

asserted.[1] For these reasons, resolution of this important issue by this Court is both needed and warranted.

I. THE NATURE OF QUALIFIED IMMUNITY MANDATES THE IMMEDIATE APPEALABILITY IN STATE COURT OF DENIAL OF A MOTION TO DISMISS OR MOTION FOR SUMMARY JUDGMENT.

42 U.S.C. § 1983 provides a cause of action for deprivation of federal constitutional and statutory rights. In order to effect resolution of these issues, Congress conferred upon state courts concurrent jurisdiction in cases brought under 42 U.S.C. § 1983. *Martinez* v. *California*, 444 U.S. 277 (1980). Section 1983 creates no separate rights itself, but instead confers remedies for enforcement of rights arising under the federal constitution or federal law. *See, Howard* v. *State Department of Highways of Colorado*, 478 F.2d 581 (10th Cir. 1973). That concurrent jurisdiction, however, "does not extend so far as to permit States to place conditions on the vindication of a federal right." *Felder* v. *Casey*, ____ U.S ____, ____, 108 S.Ct. 2302, 2304 (1988). The courts must interpret federal law, and not state law, in

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[1] The current split of opinion between the states on the appealability issue necessitates guidance by this Court. Several state courts have considered the issue with varying results. *See, e.g., Anderson* v. *City of Hopkins*, 393 N.W.2d 363 (Minn. 1986) (under Minnesota Rules of Civil Appellate Procedure, a public employee raising qualified immunity *ought* to be allowed to appeal without entry of final judgment); *Breault* v. *Chairman of Bd. of Fire Commissioners of Springfield*, 513 N.E.2d 1277 (Mass. 1987) (denial of motion to dismiss on qualified immunity grounds immediately appealable under collateral order doctrine); *Pizzato's Inc.* v. *City of Berwyn*, 523 N.E.2d 51 (Ill. App. 1988) (denial of motion to dismiss based upon qualified immunity not immediately appealable); *Ohio Civil Service Employees Association* v. *Moritz*, No. 87-AP-346 (1987 Westlaw 18211), (Ohio App. 1988) (unpublished opinion) (concluding that state courts are not bound by federal procedural rules and denying appealability of denial of motion to dismiss).

adjudicating the substantive rights of the parties to a suit brought under § 1983. *See*, 42 U.S.C. § 1988.

Recognizing that public policy considerations sometimes limit the scope of the remedies available under § 1983, courts have necessarily had to strike a balance between the remedial scope of § 1983 and the strong public policy favoring governmental efficiency. The words of Judge Learned Hand are as applicable today in this regard as they were some 40 years ago:

> The justification for . . . [granting immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

Gregoire v. *Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

While in some instances, the shield of immunity is expressly provided by the Constitution (i.e. Members of Congress), the qualified, and in some cases absolute, immunity accorded public officials flows directly from the conclusion that the Congress that enacted the 1871 Civil Rights Act did not intend to subject them to damages liability. *Mitchell* v. *Forsythe*, 472 U.S. at 538 (Stevens, J. *dissenting*); *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951); *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976). Recognizing that public policy mandates that governmental officials endowed with discretionary duties should not lightly be hailed into court and subjected to the hardships of litigation, this Court in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), refashioned the defense of qualified immunity "in such a way as to 'permit the

resolution of many insubstantial claims on summary judgment.' " 457 U.S. at 817-818. The immunity conferred by *Harlow* is not simply immunity from liability. Qualified immunity, after *Harlow*, operates in such a way that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." To that end, this Court held that government officials performing discretionary duties generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

This Court returned to the question of qualified immunity three years later in *Mitchell* v. *Forsythe*, 472 U.S. 511 (1985). In that case the Court again observed that the doctrine of qualified immunity is more than a defense to liability:

> The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the District Court's decision is effectively unreviewable on appeal from a final judgment. (emphasis in original)

472 U.S. at 526-527. Thus, this Court recognized that the doctrine of qualified immunity is an entitlement not to stand trial or face the other burdens inherent in litigation. In recognition of that entitlement, the Court held that a District Court's denial of a claim of qualified immunity, to the

extent that it turns on an issue of law, is an appealable "final decision" notwithstanding the absence of a final judgment.

Analysis of the nature of the doctrine of qualified immunity demonstrates that the right to immediately appeal denial of a motion to dismiss or summary judgment based upon qualified immunity is integral to the notion of immunity from trial. The mandate from *Mitchell* cannot be overstated: qualified immunity is an entitlement to an immunity from suit rather than a mere defense to liability, and it is effectively lost if the case is erroneously permitted to go to trial. As the Eleventh Circuit noted, "after trial, the defendant cannot obtain effective review of an order denying immunity." *Harris* v. *Deveaux*, 780 F.2d 911, 913 (11th Cir. 1986); *see also, Craft* v. *Wipf*, 810 F.2d 170, 171 (8th Cir. 1987); *Wright* v. *South Arkansas Regional Health Center. Inc.*, 800 F.2d 199, 203 (8th Cir. 1986). Unless government officials are afforded the opportunity to immediately appeal denial of a summary judgment motion on qualified immunity, their right to immunity from suit will be forever emasculated.

In this case, the Petitioners submitted a Motion for Summary Judgment arguing that their actions violated no articulable, clearly established constitutional right of which a reasonable person would have been aware. The District Court, in a one sentence order, denied Petitioners' Motion for Summary Judgment by holding that material questions of fact remained which precluded granting of summary judgment. The District Court did not address the question of whether the legal norms allegedly violated were clearly established at the time of the incident. Exercising their rights under *Mitchell*, the Petitioners appealed the denial of

their Motion for Summary Judgment to the Colorado Court of Appeals.[2] The Court of Appeals dismissed Petitioners' appeal on the grounds that it did not constitute a final judgment. The Colorado Supreme Court refused to grant a review of that dismissal.

An analogy can be drawn between the Court's opinion in *Mitchell* v. *Forsythe* and the Court's opinions in *Abney* v. *United States*, 431 U.S. 651 (1977) and *Heltoski* v. *Meanor*, 442 U.S. 500 (1979). In *Abney*, this Court held that "the rights conferred upon a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." 431 U.S. at 660. Noting that one right guaranteed by the Double Jeopardy Clause was the right not to be tried twice for the same offense, the Court concluded that "if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." 431 U.S. at 661; *see also, Mitchell* v. *Forsythe*, 472 U.S. 511, 537 (1985) (O'Connor, J., *concurring in part*).

Similarly, in *Heltoski*, the Court held that a U.S. Congressman should have taken an interlocutory appeal in a criminal case to assert the immunity conferred upon him by the Speech and Debate Clause. Crucial to the Court's holding was their view that the Speech and Debate Clause protected Congressmen " 'not only from the consequences of litigation's results but also from the burden of defending themselves.' " 442 U.S. at 508, *quoting Dombrowski* v.

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[2] Had this case been brought in federal court, there is no question that Ansell and Golden could have immediately appealed denial of their Motion for Summary Judgment.

Eastland, 387 U.S. 82 (1967). The "entitlement" recognized in *Mitchell*, like those in *Abney* and *Heltoski*, has its roots in the Constitution and federal law. And like the protections against double jeopardy and legislative immunity, a government official's qualified immunity cannot be denied by operation of state law.

The Supremacy Clause of the United States Constitution guarantees to all individuals that the rights conferred upon them under the federal Constitution and federal statutes will not be denied by operation of state law. The Supremacy Clause states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." U.S. Const. Art. VI, Cl.2. Therefore, the states are devoid of power to retard, impede, burden or in any measure control the operational laws enacted by Congress, to carry into execution the powers vested in the general government. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967).

This case, however, involves more than the question of conflicting procedural rules. When state procedural rules adversely impact the substantive rights of an individual guaranteed under federal law, the Supremacy Clause mandates that those state procedural rules must give way to the federal right. The Colorado state court decisions in this case effectively emasculate the rights of government officials to qualified immunity from suit.

Although Congress has given concurrent state courts to entertain suits under 42 U.S.C. § 1983, Congress did so with the caveat that the statute is to be applied in adjudicating civil rights claims in "conformity with the laws of the United States, so far as such laws are suitable" and that

state law shall only apply "so far as the same is not inconsistent with" federal law. 42 U.S.C. § 1988. As this Court concluded, Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action. *Wilson* v. *Garcia*, 471 U.S. 261, 268 (1985).

This Court addressed the question of federal preemption earlier this term in *Felder* v. *Casey*, ____ U.S. ____, 108 S.Ct. 2302 (1988), when it held that a state notice of claim statute which conflicted with the remedial scheme of section 1983 was preempted pursuant to the Supremacy Clause. Noting that a "federal right cannot be defeated by the forms of local practice," Justice Brennan writing for the majority held " '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' " *Felder*, ____ U.S. at ____, 108 S.Ct. at 2306, *quoting Free* v. *Bland*, 369 U.S. 663, 666 (1962). Therefore, the Court concluded that Wisconsin's notice of claim statute is preempted when a § 1983 action is brought in state court.

To allow states to pick and choose in a piecemeal fashion whether they want to recognize the collateral order exception in *Mitchell* would lead to radically different treatment of § 1983 actions among the judiciary. Such a ruling would encourage forum shopping, as a plaintiff could elect to bring suit in state rather than federal court in order to circumvent federal rights which the defendants may

invoke.[3] This situation is precisely that foreseen in *Felder*, where the Court struck down a state procedural rule which "conflicted" both in its purpose and efforts with the remedial objectives of § 1983 litigation and would "frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court." ____ U.S. at ____, 108 S.Ct. at 2302. Therefore, this Court should grant certiorari to the Supreme Court of Colorado to resolve this important and timely issue.

II. PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY.

As this Court noted in *Harlow*, bare allegations of malice should not suffice to subject government officials either to the cost of trial or to the burdens of broad-reaching discovery. 457 U.S. at 817-18. Unless the plaintiff's allegations state a violation of a clearly established federal constitutional right or federal statutory right, a defendant pleading qualified immunity is entitled to the dismissal of the plaintiff's claims before the commencement of discovery. *Mitchell* v. *Forsythe*, 472 U.S. 511, 526. In deciding whether the law that the defendant allegedly violated was clearly established, the trial court must examine the law as it was at the time of the defendant's actions. *Harlow*, 457 U.S. at 818.

Once a defendant has interposed qualified immunity, the burden shifts to the plaintiff to convince the court that the statutory or constitutional rights which were allegedly

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[3] Petitioners are unable to determine how many states have denied immediate appeal on denial of qualified immunity. Because the rights conferred by qualified immunity are effectively unreviewable after trial, the determination of whether denial of qualified immunity is immediately appealable would become moot on appeal. Therefore, discussion of such issues is unlikely to appear in reported opinions.

violated were clearly established at the time and that a reasonable person would have known of those rights. *Davis* v. *Scherer*, 468 U.S. 183, 197 (1984). The plaintiff must plead facts which, if true, describe a violation of a clearly established statutory or constitutional right of which a reasonable public official, under an objective standard, would have known. The failure to so plead precludes a plaintiff from proceeding further, even from engaging in discovery, since the plaintiff has failed to allege acts that are outside the scope of the defendant's immunity. *Mitchell*, 472 U.S. at 526; *Dominique* v. *Telb*, 831 F.2d 673, 676 (6th Cir. 1987). A plaintiff's failure to satisfy this burden subjects his pleadings to dismissal at that stage. *Id.*

Determination of whether a particular right was clearly established at the time of the alleged action, or whether a reasonable person would have known of the existence of such a right, is a purely legal question reserved for the court as a matter of law. The Sixth Circuit Court of Appeals summarized the role of the trial court as follows:

> Thus, before filing a formal affirmative defense in his answer, the defendant could properly challenge the sufficiency of the complaint under F.R.C.P. 12(b)(6) on the basis that he was entitled to a qualified immunity because the facts pleaded would not show that his conduct violated clearly established law which a reasonable person should have known at the time . . . . Resolution of that issue is purely a matter of law for the trial judge to determine, or for [an appellate court] to decide on any appeal which might be taken. Since the question is one of law, the trial court could not, by characterizing it as a disputed factual issue, avoid deciding whether the [alleged misconduct] at that time violated clearly established federal rights. The source for such a determination is, of course,

> in federal constitutional, statutory or case law existing at the time. Any decision of the trial court should indicate that law and state the basis for its conclusion . . . .
>
> * * *
>
> The thrust of our opinion is to observe that under *Mitchell* v. *Forsythe*, the trial judge is burdened with a responsibility at an early stage, to make determinations of law based upon what the clearly established law governing the case was at the time of the challenged acts. Once the issue of qualified immunity is properly injected in the case either by a motion to dismiss, an affirmative defense, or a motion for summary judgment, the plaintiff is obliged to present facts which if true would constitute a violation of clearly established law. (Citations omitted)

Dominique v. *Telb*, 831 F.2d 673, 677 (6th Cir. 1987)

The District Court in this case was unwilling to come to grips with the determination of whether the legal norms allegedly violated were clearly established at the time of the incident. The Court failed to rule on whether the law allegedly violated was clearly established at the time of the alleged conduct. Therefore, the District Court committed clear error in denying Petitioners' Motion for Summary Judgment.

III. CONCLUSION

If, upon denial of summary judgment based upon qualified immunity, a government official sued under § 1983 must await the outcome of a trial to appeal that denial, the official's qualified immunity is irretrievably lost. The very nature of qualified immunity — the right not to stand trial

for insubstantial claims — mandates the immediate appealability of denial of that immunity. This Court explicitly refashioned the doctrine of qualified immunity in the *Harlow* case to reflect this right. In this case, Colorado state court decisions frustrate these rights. To allow the error of the District Court, in combination with a procedural error by the Colorado Court of Appeals, to eviscerate the Petitioners' right not to stand trial if their actions were proper is an error of the first magnitude and cannot be condoned by this Court. For these reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

HALL & EVANS

By _____

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Of Counsel

CERTIFICATE OF MAILING

I hereby certify that on this day of August, 1988, three true and correct copies of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO were placed in the U.S. mail, postage prepaid and addressed to:

V. James Robinson, Esq.
Robinson & Mallon, P.C.
1202 Highway 74, Suite 411
Evergreen, Colorado 80439

_____

APPENDIX A

Case No. 86-CV-2558, Division 2

IN THE

District Court,

COUNTY OF JEFFERSON, STATE OF COLORADO

JOHN M. SHANNON,

Plaintiff,

vs.

COLORADO SCHOOL OF MINES,
GEORGE S. ANSELL AND JOHN O. GOLDEN,

Defendants.

ORDER

This matter comes before the Court on Defendants' Motion for Summary Judgment. The Court finds that it has jurisdiction over the parties and subject matter of the action, and being fully advised in the premises, has dispensed with a hearing on the motion pursuant to C.R.C.P. Rule 121, Section 1-15.

The Court finds that there are numerous material issues of fact presented in this case, and thus, summary judgment on any of the claims for relief would be inappropriate.

Therefore, the Court orders that Defendants' Motion for Summary Judgment be denied.

DONE AND SIGNED IN OPEN COURT This 16th day of November, 1987

BY THE COURT:

/s/ Gaspar F. Perricone
JUDGE

APPENDIX B

Court of Appeals

JOHN M. SHANNON, *Plaintiff-Appellee,* v. GEORGE S. ANSELL AND JOHN O. GOLDEN, *Defendants-Appellants.*	No. 87CA1809 ORDER OF DISMISSAL (Trial Ct. No. 86CV2558)

Upon consideration of appellants' response to the court's Order to Show Case of May 25, 1988, the court determines that claims remain pending in the trial court and that the appeal is from the denial of a motion for summary judgment. Accordingly, there is not yet a final, appealable judgment. *See* C.R.C.P. 54(b); *Glennon Heights. Inc.* v. *Central Bank & Trust*, 658 P.2d 872 (Colo. 1983); *Harding Glass Co.* v. *Jones*, 640 P.2d 1123 (Colo. 1982); *Manuel* v. *Fort Collins Newspapers, Inc.*, 631 P.2d 1114 (Colo. 1981).

IT IS THEREFORE ORDERED that this appeal is hereby DISMISSED without prejudice.

BY THE COURT: Babcock, J.
Hume, J.
Jones, J.

Dated: June 17, 1988

Copies to: Counsel of Record
Clerk of the District Court

APPENDIX C

Supreme Court, State of Colorado

ORIGINAL PROCEEDING, DISTRICT COURT,
JEFFERSON COUNTY

ORDER OF COURT

GEORGE S. ANSELL AND JOHN O. GOLDEN, *Petitioners,* vs. COLORADO COURT OF APPEALS, and THE HONORABLE JUSTICES BABCOCK, HUME and JONES, Judges thereof, Respondents with respect to Petition for Writ of Mandamus; DISTRICT COURT, IN AND FOR THE COUNTY OF JEFFERSON and The HONORABLE GASPAR F. PERRICONE, District Court Judge, Respondents with respect to the Petition for Relief in the Nature of Prohibition.	Case No. 88SA212 Colorado COURT OF APPEALS

Upon consideration of the Petition for Writ of Mandamus or in the Alternative Petition for Relief in the Nature of Prohibition filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 30, 1988.

cc: Honorable Gaspar Perricone
Hall of Justice
1701 Arapahoe
Golden, Colorado 80401-6199

Gary Sonke, Clerk
Colorado Court of Appeals

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